

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
EASTERN WASHINGTON REGION  
STATE OF WASHINGTON

CONCERNED FRIENDS OF FERRY  
COUNTY and DAVID L. ROBINSON,

Petitioners,

v.

FERRY COUNTY,

Respondent.

Case No. 97-1-0018c

**ORDER FINDING CONTINUING  
NONCOMPLIANCE [Fish and Wildlife  
Habitat Conservation Areas]**

**I. SYNOPSIS**

On November 13, 2012, the Board held a Compliance Hearing in Republic, Washington. The Board finds and concludes that Ferry County is in continuing non-compliance with the Growth Management Act requirement to include the Best Available Science in designating and protecting Fish and Wildlife Habitat Conservation Areas for Endangered, Threatened, and Sensitive Species under RCW 36.70A.170, RCW 36.70A.060(2), and RCW 36.70A.172. The Board also finds and concludes that Ferry County has achieved compliance with respect to the Critical Areas Low Intensity Land Use Definition.

Between 1999 and 2013, the Board has issued 15 separate Orders Finding Continuing Non-Compliance with the GMA for Ferry County's failure to include Best Available Science in designating and protecting Critical Areas, and in particular, the County's failure to designate and protect Fish and Wildlife Habitat Conservation Areas.

**II. BURDEN OF PROOF**

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.<sup>1</sup> After the period for compliance

<sup>1</sup> RCW 36.70A.300(3)(b).

1 has expired, the Board is required to hold a hearing to determine whether the local  
2 jurisdiction has achieved compliance.<sup>2</sup> For purposes of Board review of the comprehensive  
3 plans and development regulations adopted by local governments in response to a non-  
4 compliance finding, the presumption of validity applies and the burden is on the challenger  
5 to establish that the new adoption is clearly erroneous in view of the entire record before the  
6 board and in light of the goals and requirements of this chapter.<sup>3</sup>

8 In order to find the County's action clearly erroneous, the Board must be "left with the firm  
9 and definite conviction that a mistake has been made."<sup>4</sup>

11 Within the framework of state goals and requirements, the Board must grant deference to  
12 local governments in how they plan for growth:

14 In recognition of the broad range of discretion that may be exercised by  
15 counties and cities in how they plan for growth, consistent with the  
16 requirements and goals of this chapter, the legislature intends for the boards  
17 to grant deference to the counties and cities in how they plan for growth,  
18 consistent with the requirements and goals of this chapter. Local  
19 comprehensive plans and development regulations require counties and cities  
20 to balance priorities and options for action in full consideration of local  
21 circumstances. The legislature finds that while this chapter requires local  
22 planning to take place within a framework of state goals and requirements, the  
23 ultimate burden and responsibility for planning, harmonizing the planning goals  
24 of this chapter, and implementing a county's or city's future rests with that  
25 community. RCW 36.70A.3201 (in part).

26 In sum, during compliance proceedings the burden remains on the Petitioner to overcome  
27 the presumption of validity and demonstrate that any action taken by the County is clearly  
28 erroneous in light of the goals and requirements of Chapter 36.70A RCW (the Growth  
29 Management Act).<sup>5</sup> Where not clearly erroneous and thus within the framework of state  
30 goals and requirements, the planning choices of the local government must be granted  
31 deference.

32 <sup>2</sup> RCW 36.70A.330(1) and (2).

<sup>3</sup> RCW 36.70A.320(1), (2), and (3).

<sup>4</sup> *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

<sup>5</sup> RCW 36.70A.320(2).

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### III. PROCEDURAL HISTORY

On August 29, 1997, a Petition for Review was filed in Case No. 97-1-0018 alleging *inter alia* non-compliance with the GMA relating to designating Critical Areas and protecting Fish and Wildlife Habitat Conservation Areas. On July 31, 1998, the Board issued a Final Decision and Order finding Ferry County in non-compliance.

On May 18, 2006, a Petition for Review was filed in Case No. 06-1-0003 also alleging *inter alia* non-compliance with the GMA relating to designating Critical Areas and protecting Fish and Wildlife Habitat Conservation Areas. On October 6, 2006, the Board issued a Final Decision and Order finding Ferry County in non-compliance.

Between 1999 and 2011, the Board issued 14 separate Orders Finding Continuing Non-Compliance with the GMA for Ferry County's failure to include Best Available Science in designating and protecting Critical Areas, and in particular, the County's failure to designate and protect Fish and Wildlife Habitat Conservation Areas.

Orders Finding Continuing Non-Compliance were issued on September 30, 1999, May 23, 2000, January 26, 2001, December 23, 2002, January 24, 2003, June 9, 2008 (two orders), February 13, 2009, March 17, 2009, February 23, 2010, March 3, 2010, September 10, 2010, April 4, 2011, and December 1, 2011.

During 2003, 2004, and 2005, the Superior Court, Court of Appeals, and Supreme Court respectively upheld and affirmed the Board's prior orders that Ferry County failed to include the Best Available Science in designating and protecting Fish and Wildlife Habitat Areas.<sup>6</sup>

On November 13, 2012, the Board held a Compliance Hearing in Republic, Washington involving three coordinated cases: Case Nos. 97-1-0018, 01-1-0019, and 06-1-0003. The hearing panel for deciding these three cases is comprised of Raymond L. Paoletta,

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<sup>6</sup> *Ferry County v. Concerned Friends of Ferry County, et al.*, 155 Wn.2d 824 (2005).

1 Presiding Officer, and Board members Chuck Mosher and Margaret Pageler (by telephone).  
2 Attending the Compliance Hearing were: attorney Tim Trohimovich, representing Concerned  
3 Friends of Ferry County, David L. Robinson, and Futurewise; Deputy Prosecuting Attorney  
4 L. Michael Golden, representing Respondent Ferry County; David L. Robinson; and Ferry  
5 County Planning Director Irene Whipple. At the beginning of the Compliance Hearing, the  
6 Board considered Petitioners' Corrected Motion to Supplement the Record (dated October  
7 19, 2012) with 25 identified documents that were either produced by Ferry County or  
8 provided to Ferry County during the public comment period. Ferry County indicated it had no  
9 objection to Petitioners' Motion to Supplement, and the Board granted Petitioners' Motion to  
10 Supplement the Record.  
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13 This Compliance Order decides the compliance issues presented in Case Nos. 97-1-0018  
14 and 06-1-0003 relating to Fish and Wildlife Habitat Conservation Areas. Case No. 01-1-  
15 0019 (Agricultural Lands of Long Term Commercial Significance) will be decided in a  
16 separately issued Compliance Order.  
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#### 18 IV. DISCUSSION

##### 19 A. FISH AND WILDLIFE HABITAT CONSERVATION AREAS

##### 20 1. Applicable Law

21 Each county shall designate where appropriate: "Critical areas." RCW 36.70A.170(1)(d).

22 The term "Critical areas" is defined as including the following areas and ecosystems:

- 23  
24 (a) wetlands;  
25 (b) areas with a critical recharging effect on aquifers used for potable water;  
26 (c) fish and wildlife habitat conservation areas;  
27 (d) frequently flooded areas; and  
28 (e) geologically hazardous areas.<sup>7</sup>

29 Each county shall adopt development regulations that protect designated critical areas.  
30 RCW 36.70A.060(2). The term "development regulations" is defined as:  
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<sup>7</sup> RCW 36.70A.030(5).

1 ...the controls placed on development or land use activities by a county or city,  
2 including, but not limited to, zoning ordinances, critical areas ordinances,  
3 shoreline master programs, official controls, planned unit development  
4 ordinances, subdivision ordinances, and binding site plan ordinances together  
5 with any amendments thereto. A development regulation does not include a  
6 decision to approve a project permit application, as defined in RCW  
7 36.70B.020, even though the decision may be expressed in a resolution or  
8 ordinance of the legislative body of the county or city.<sup>8</sup>

9 Development regulations shall be consistent with and implement the comprehensive plan.  
10 RCW 36.70A.040(4)(d).<sup>9</sup>

11 In designating and protecting critical areas, the GMA requires that "counties and cities shall  
12 include the best available science (BAS) in developing policies and development regulations  
13 to protect the functions and values of critical areas. In addition, counties and cities shall give  
14 special consideration to conservation or protection measures necessary to preserve or  
15 enhance anadromous fisheries." RCW 36.70A.172(1).

16  
17 Evidence of the best available science must be included in the record and must be  
18 considered substantively in the development of critical areas policies and regulations.<sup>10</sup>  
19 "Although BAS does not require the use of a particular methodology, at a minimum BAS  
20 requires the use of a scientific methodology."<sup>11</sup> Although a county need not develop  
21 scientific information through its own means, it must rely on scientific information and must  
22 analyze that information using a reasoned process.<sup>12</sup> Department of Commerce Guidelines  
23 state that a county should address on the record "the relevant sources of best available  
24 scientific information included in the decision-making."<sup>13</sup>  
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30 <sup>8</sup> RCW 36.70A.030(7).

31 <sup>9</sup> See also RCW 36.70A.060(3), RCW 36.70A.120; and RCW 36.70A.130(1)(d).

32 <sup>10</sup> *Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

<sup>11</sup> *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824, 837 (2005).

<sup>12</sup> *Id.* at 836-837.

<sup>13</sup> WAC 365-195-915(1)(b).

1 If a county chooses to disagree with or ignore scientific recommendations and resources  
2 provided by state agencies or Indian tribes, which a county could do, the county must  
3 unilaterally develop and obtain valid scientific information.<sup>14</sup> The GMA does not require a  
4 county to follow BAS; rather it is required to "include" BAS in its record. A county may depart  
5 from BAS if it provides a reasoned justification for such departure.<sup>15</sup>  
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7 RCW 36.70A.170(2) provides that in making critical areas designations, counties and cities  
8 shall consider the guidelines established by the Department of Commerce pursuant to RCW  
9 36.70A.050(1). Under RCW 36.70A.050, these are "minimum guidelines" that apply to all  
10 jurisdictions "to guide the classification" of critical areas. The Department of Commerce  
11 "minimum guidelines" are codified in WAC Chapter 365-190.  
12

13  
14 WAC 365-190-030(6)(a) defines Fish and Wildlife Habitat Conservation Areas as follows:

15 "Fish and wildlife habitat conservation areas" are areas that serve a critical  
16 role in sustaining needed habitats and species for the functional integrity of the  
17 ecosystem, and which, if altered, may reduce the likelihood that the species  
18 will persist over the long term. These areas may include, but are not limited to,  
19 rare or vulnerable ecological systems, communities, and habitat or habitat  
20 elements including seasonal ranges, breeding habitat, winter range, and  
21 movement corridors; and areas with high relative population density or species  
22 richness. Counties and cities may also designate locally important habitats  
23 and species.

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25 WAC 365-190-130(1) states:

26 "Fish and wildlife habitat conservation" means land management for  
27 maintaining populations of species in suitable habitats within their natural  
28 geographic distribution so that the habitat available is sufficient to support  
29 viable populations over the long term and isolated subpopulations are not  
30 created. This does not mean maintaining all individuals of all species at all  
31 times, but it does mean not degrading or reducing populations or habitats so  
32 that they are no longer viable over the long term. Counties and cities should  
engage in cooperative planning and coordination to help assure long term  
population viability.

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<sup>14</sup> *Id.* at 836.

<sup>15</sup> *Swinomish Indian Tribal Community v. WWGMHB*, 161 Wn.2d 415, 430-431 (2007).

1 Fish and wildlife habitat conservation areas contribute to the state's  
2 biodiversity and occur on both publicly and privately owned lands. Designating  
3 these areas is an important part of land use planning for appropriate  
4 development densities, urban growth area boundaries, open space corridors,  
5 and incentive-based land conservation and stewardship programs.

6 Under WAC 365-190-130(2), Fish and Wildlife Habitat Conservation Areas that must be  
7 considered for classification and designation include *inter alia*:

- 8 (a) Areas where endangered, threatened, and sensitive species have a  
9 primary association;
- 10 (b) Habitats and species of local importance, as determined locally; . . .
- 11 (e) Naturally occurring ponds under twenty acres and their submerged aquatic  
12 beds that provide fish or wildlife habitat;
- 13 (f) Waters of the state; . . .

14 When classifying and designating fish and wildlife habitat conservation areas, counties must  
15 include best available science and should consider *inter alia*:

16 Evaluating land uses surrounding ponds and fish and wildlife habitat  
17 conservation areas that may negatively impact these areas, or conversely, that  
18 may contribute positively to their function, and

19 Establishing buffer zones around these areas to separate incompatible uses  
20 from habitat areas.<sup>16</sup>

21 WAC 365-190-080(4) provides in pertinent part as follows:

22 Counties and cities should designate critical areas by using maps and  
23 performance standards . . . However, because maps may be too inexact for  
24 regulatory purposes, counties and cities should rely primarily on performance  
25 standards to protect critical areas. Counties and cities should apply  
26 performance standards to protect critical areas when a land use permit  
27 decision is made.

28 The Department of Commerce Minimum Guidelines also state that counties and cities  
29 should identify and classify seasonal ranges and habitat elements where federal and state  
30 listed endangered, threatened and sensitive species have a primary association and which,  
31 if altered, may reduce the likelihood that the species will persist over the long term. Counties  
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<sup>16</sup> WAC 365-190-130(3).

1 and cities should consult current information on priority habitats and species identified by  
2 the Washington Department of Fish and Wildlife (WDFW).<sup>17</sup> The goal of fish and wildlife  
3 habitat conservation is to manage land so as to maintain species in suitable habitats within  
4 their natural geographic distribution so that isolated subpopulations are not created.<sup>18</sup>  
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## 6 **2. Prior Compliance Order**

7 In the December 1, 2011 Compliance Order issued in Cases 97-1-0018 and 06-1-0003, the  
8 Board found Ferry County out of compliance with the GMA relating to Critical Areas and  
9 Best Available Science (BAS) as follows:  
10

- 11 • Failure to include the Best Available Science in designating and protecting Fish and  
12 Wildlife Habitat Conservation Areas under RCW 36.70A.170, RCW 36.70A.060(2),  
13 and RCW 36.70A.172, and
- 14 • Failure to include the Best Available Science in protecting Wetlands under RCW  
15 36.70A.060(2) and RCW 36.70A.172.

## 16 **3. Recent Legislative Action by Ferry County**

17 On September 24, 2012, Ferry County passed Ordinance #2012-04 amending Ordinance  
18 #2011-04 updating Sections 7.4.17, 7.4.30, 7.4.31, 7.4.33, 7.4.35, 7.4.42, 7.7.5 and 7.7.6 of  
19 the Comprehensive Plan.<sup>19</sup>  
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21 On September 24, 2012, Ferry County passed Critical Areas Ordinance #2012-05  
22 amending Ferry County Resource Lands and Critical Areas Ordinance #2011-02, Sections  
23 3.00, 4.00, 4.01, 9.01, 9.02, 9.03, 9.04, and 10.16.<sup>20</sup>  
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## 25 **4. Pending Court Appeal – Habitats and Species of Local Importance**

26 At the Compliance Hearing, the parties advised the Board that a court appeal is pending  
27 relating to this compliance case. On November 8, 2012, the Ferry County Superior Court  
28 entered an order as follows: “The part of the Board’s order addressing the designation of  
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31 <sup>17</sup> WAC 365-190-130(4)(a).  
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<sup>18</sup> *Stevens County v. Futurewise*, 146 Wn. App. 493, 511 (2008), excerpting from former WAC 365-190-080(5).

<sup>19</sup> Ferry County’s 2012 Index to Compliance Report, Attachment 1 (October 5, 2012).

<sup>20</sup> Ferry County’s 2012 Index to Compliance Report, Attachment 2 (October 5, 2012).



1 habitats and species of local importance is reversed.”<sup>21</sup> That Superior Court Order is now  
2 under appeal in the Court of Appeals. Accordingly, all issues relating to “the designation of  
3 habitats and species of local importance” will be held in abeyance until the Board receives  
4 instructions from the court, and the Board will not address “habitats and species of local  
5 importance” in this Compliance Order.  
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## 7 **5. Positions of the Parties**

8 Petitioners assert that Ferry County failed to include the Best Available Science (BAS) in  
9 designating Fish and Wildlife Habitat Conservation Areas, including areas with which  
10 Endangered, Threatened and Sensitive species have a primary association.<sup>22</sup> Respondent  
11 argues that Ferry County designated Fish and Wildlife Habitat Conservation Areas in  
12 compliance with the GMA’s procedural and substantive requirements.<sup>23</sup>  
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15 Petitioners further allege that Ferry County failed to include the Best Available Science in  
16 protecting polygon habitats from adjacent and nearby developments. Respondent  
17 acknowledges that there is work yet to be done to bring the County into full compliance with  
18 the 2011 Compliance Order with regard to species-specific buffers and triggering of Habitat  
19 Management and Mitigation Plan for development proposed within certain distances of non-  
20 buffered habitat.<sup>24</sup>  
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## 22 **6. Board Analysis – Designation and Protection of Fish and Wildlife Habitat Areas**

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24 The GMA requires counties to both **designate and protect** Fish and Wildlife Habitat  
25 Conservation Areas (FWHC Areas).<sup>25</sup> Designation is a fundamental first step that informs  
26 County decision makers and the public on determining the location of FWHC Areas. The  
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30 <sup>21</sup> Ferry County Superior Court Findings of Fact, Conclusions of Law and Order Granting Partial Summary  
31 Judgment, attached to Declaration of Counsel Re: Substitution of Exhibit (November 9, 2012).

32 <sup>22</sup> Concerned Friends of Ferry County’s, David L. Robinson’s, and Futurewise’s Concurrence in and  
Objections to a Finding of Compliance and Petition for Imposition of Invalidity (October 19, 2012).

<sup>23</sup> Ferry County’s 2012 Response to Petitioners Objections (October 29, 2012).

<sup>24</sup> Ferry County’s 2012 Response to Petitioners Objections, page 10 (October 29, 2012).

<sup>25</sup> RCW 36.70A.170(1)(d); RCW 36.70A.060(2).

1 GMA's mandate to protect FWHC Areas cannot be fulfilled unless people can figure out  
2 where FWHC Areas are located.

3  
4 When designating Fish and Wildlife Habitat Conservation Areas, Best Available Science  
5 (BAS) must be included in the record -- the County must rely on scientific information and  
6 must analyze that information using a reasoned process, i.e., a scientific methodology. *Ferry*  
7 *County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 836-837 (2005).  
8

9 WAC 365-195-905(2) provides that counties and cities "may use information that local, state  
10 or federal natural resource agencies have determined represents the best available  
11 science." WAC 365-190-130(4) states that counties and cities "should consult current  
12 information on priority habitats and species identified by the Washington State Department  
13 of Fish and Wildlife [WDFW]."  
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16 In the present case, Petitioners allege the County has failed to include Best Available  
17 Science in designating and protecting Fish and Wildlife Habitat Conservation Areas.  
18

19 Ferry County Critical Areas Ordinance No. 2012-05 states generally in Section 4.01 that  
20 "BAS has been included in designating and protecting critical areas and in the development  
21 of policies and regulations contained herein." Ordinance 2012-04, Section 7.4.17 entitled  
22 "Designation Policy" states that the "Ferry County Critical Areas Ordinance, (CAO) shall  
23 define, classify, designate and regulate fish and wildlife habitat conservation areas and  
24 include best available science in the processes for doing so as required by Chapter 36.70A  
25 RCW." However, neither Ordinance contains findings that address on the record "the  
26 relevant sources of best available scientific information included in the decision-making," as  
27 specified in the Department of Commerce Rules on Best Available Science.<sup>26</sup>  
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30 The Board must examine the entire record in this case, including the actual scientific  
31 information relied upon by the County, to determine if Petitioners have satisfied their burden  
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<sup>26</sup> WAC 365-195-915(1)(b).

1 to demonstrate that the County failed to include Best Available Science as to FWHC Area  
2 designations and policy development.

3  
4 Under WAC 365-190-130(2), the County must classify and designate those areas where  
5 Endangered, Threatened, and Sensitive (ETS) species have a primary association. WAC  
6 365-190-130(4)(a) states that counties should identify and classify seasonal ranges and  
7 habitat elements where federal and state listed endangered, threatened and sensitive (ETS)  
8 species have a primary association and which, if altered, may reduce the likelihood that the  
9 species will persist over the long term.  
10

11 In 2005, the Washington State Supreme Court held that Ferry County must designate and  
12 protect Endangered, Threatened, and Sensitive species and their habitats.<sup>27</sup> The Supreme  
13 Court noted:  
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15       The fact that the county's listing omits both the peregrine falcon and the bull  
16       trout, both of which are ETS species known to be present in Ferry County,  
17       further supports that the listing was not generated using BAS.<sup>28</sup>

18 The Court of Appeals has held that the "GMA directs counties to determine what lands are  
19 primarily associated with listed species, and then to adopt regulations protecting those lands  
20 . . . the GMA requires [Stevens County] to designate and protect all critical areas within its  
21 boundaries."<sup>29</sup>  
22

### 23 **Ordinance 2012-04, Section 7.4.17**

24 Petitioners briefed arguments related to Section 7.4.17 on designation policies for Fish and  
25 Wildlife Habitat Conservation Areas and 27 local species being omitted from the policies.  
26 However, these arguments appear to relate to matters currently under review in the Court of  
27 Appeals.<sup>30</sup> The Board cannot address the "designation of habitats and species of local  
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30 <sup>27</sup> *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 838-39, 123 P.3d 102, 109 (2005).

31 <sup>28</sup> *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 837 (2005).

32 <sup>29</sup> *Stevens County v. Futurewise*, 146 Wn. App. 512 (2008); review denied, *Stevens County v. Futurewise*, 165 Wn.2d 1038 (2009).

<sup>30</sup> Concerned Friends of Ferry County's, David L. Robinson's, and Futurewise's Concurrence in and Objections to a Finding of Compliance and Petition for Imposition of Invalidity, pages 6-14 (October 19, 2012).

1 importance" at this time since that is currently being litigated in the courts and is being held  
2 in abeyance pending court instructions.

3  
4 **Ordinance 2012-05, Section 9.01 Classification**

5 The Washington State Department of Fish and Wildlife (WDFW) maintains a list of Priority  
6 Habitats and Species (PHS), based on the Best Available Science, which identifies those  
7 species known to occur in Ferry County, together with areas where habitat primarily  
8 associated with the species exists.<sup>31</sup> "Priority Habitats" are those habitat types with unique  
9 or significant value to many fish or wildlife species; "Priority Species" are those fish and  
10 wildlife species requiring special efforts to ensure their perpetuation because of their low  
11 numbers, sensitivity to habitat alteration, tendency to form vulnerable aggregations, or  
12 because they are of commercial, recreational, or tribal importance.<sup>32</sup>

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14  
15 Ordinance 2012-05, Section 9.01(1)(a) classified two federally-listed ETS species: Canada  
16 Lynx (Threatened) and Grizzly Bear (Threatened). However, Section 9.01(1)(a) did not  
17 classify two other federally-listed ETS species/habitats known to occur in Ferry County: Bull  
18 Trout and Steelhead, both of which are federally listed as "Threatened."

19  
20 Ordinance 2012-05, Section 9.01(1)(b) classified seven state-listed ETS species: Common  
21 Loon, Fisher, Ferruginous Hawk, Bald Eagle, Peregrine Falcon, Gray Wolf, and  
22 Flammulated Owl. However, Section 9.01(1)(b) did not classify three other state-listed ETS  
23 species: Upland Sandpiper (endangered), Grizzly Bear (endangered), and Lynx  
24 (threatened).

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27 These omissions of federal and state listed ETS species are unsupported by any evidence  
28 in the record and represent a departure from the Best Available Science without any  
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31 <sup>31</sup> WDFW List of Species and Habitats Identified for Ferry County, attached as Tab 601 to Futurewise's Motion  
32 to Supplement the Record (Oct. 19, 2012) -- <http://wdfw.wa.gov/conservation/phs/>.

<sup>32</sup> *Management Recommendations for Washington's Priority Species, Volume IV: Birds*; Larson, Azerrad, and  
Nordstrom, Technical Editors, Washington Department of Fish and Wildlife (May 2004) -- Futurewise's Motion  
to Supplement the Record, Tab 601 (Oct. 19, 2012).

1 reasoned justification. The Board is left with the firm and definite conviction that a mistake  
2 has been made in failing to classify all federal and state ETS listed species.

3  
4 **Ordinance 2012-05, Section 9.02 Designation**

5 The record contains an August 14, 2012 Letter to Ferry County from Biologist Karin Divens  
6 of the Washington State Department of Fish and Wildlife. Ms. Divens commended Ferry  
7 County for making "some excellent efforts towards designating habitats for ETS  
8 [Endangered, Threatened, and Sensitive] species by specifically designating important  
9 habitat areas that are part of recovery plans or other documents." Biologist Divens made the  
10 following specific recommendations (in pertinent part) as to Bald Eagle, Peregrine Falcon,  
11 and Gray Wolf Habitat Conservation Areas:  
12

13 Bald Eagle: The priority area for bald eagles is the nesting site or Breeding  
14 Area, the area necessary to support reproduction and the rearing of young;  
15 includes breeding sites and adjacent foraging habitat, and may include a  
16 disturbance buffer. Another important Priority Area for bald eagles are  
17 Communal Roosts: Habitat features (e.g. trees) that are regularly or  
18 traditionally used by eagles for resting, territory display, or foraging. Although  
19 the Bald Eagle is no longer listed as a State Threatened species, it remains  
20 classified by WDFW as a State Sensitive species. Sensitive species are any  
21 wildlife species native to the state that are vulnerable or declining and are  
22 likely to become Endangered or Threatened in a significant portion of their  
23 range within the state without cooperative management or removal of threats.  
24 *For that reason, WDFW strongly recommends that cities and counties*  
25 *continue to protect eagles under local critical areas rules pursuant to the*  
26 *Growth Management Act.* Designating and protecting priority areas for bald  
27 eagles may well help to prevent future re-listing of this species and the need  
28 for landowners to prepare [or] State to require Bald Eagle Management Plans.

29 Peregrine Falcon: This falcon species has made a recovery in Washington  
30 State since the use of DDT was banned and has gone from an Endangered  
31 status to Sensitive. This priority species is considered particularly vulnerable  
32 during nesting season March – June. Peregrines have specific habitat  
requirements for nesting. Peregrine falcons usually nest on cliffs, typically 45  
m (150 ft.) or more in height. They will also nest on off-shore islands and  
ledges on vegetated slopes. Eggs are laid and young are reared in small  
caves or on ledges. Nest sites are generally near water. The birds are  
sensitive to disturbance during all phases of the nesting season (1 March  
through 30 June). WDFW recommends that Ferry County designate cliff

1 habitats as the primary habitat area of association for this species thereby  
2 helping to ensure that land use activities do not inadvertently result in impacts  
3 to nesting habitats. Consider also including language from the WDFW PHS  
4 Management recommendations for peregrines.

5 Gray Wolf: The language used in the CAO is consistent with the WDFW Gray  
6 Wolf Recovery Plan, with the exception of "Therefore, no habitat qualifies as a  
7 critical area". WDFW suggests that the County strike this sentence, or  
8 consider replacing it with a statement about protection of identified den sites  
9 during breeding season.

10 As to the Bald Eagle, Ordinance 2012-05, Section 9.02 states: "Landowners should consult  
11 the US Fish and Wildlife Service to determine if a permit is required when proposing land  
12 use activities within 330 or 660 feet of an eagle nest." But Section 9.02 does not actually  
13 designate any Fish and Wildlife Habitat for the Bald Eagle. In particular, Section 9.02 fails to  
14 protect the attributes of Bald Eagle habitat recommended by WDFW's Habitat Biologist:  
15 breeding sites and adjacent foraging habitat (may include a disturbance buffer) together  
16 with Communal Roosts, i.e., Habitat features (e.g. trees) that are regularly or traditionally  
17 used by eagles for resting, territory display, or foraging. These omissions are unsupported  
18 by any evidence in the record and represent a departure from Best Available Science  
19 without any reasoned justification. The Board is left with the firm and definite conviction that  
20 a mistake has been made in failing to designate Bald Eagle habitat.  
21

22  
23 As to Peregrine Falcons, Section 9.02 designates cliffs that are 150 feet or more in height.  
24 In addition, WDFW's Habitat Biologist stated: Peregrine Falcons also nest on off-shore  
25 islands and ledges on vegetated slopes. Eggs are laid and young are reared in small caves  
26 or on ledges. Nest sites are generally near water. The birds are sensitive to disturbance  
27 during all phases of the nesting season (1 March through 30 June). Section 9.02 does not  
28 reflect a consideration of this BAS. The Board is left with the firm and definite conviction that  
29 a mistake has been made in failing to designate Peregrine Falcon habitat.  
30

31  
32 As to the Gray Wolf, Section 9.02 does not actually designate any Fish and Wildlife Habitat  
for the Gray Wolf. WDFW's Habitat Biologist recommended protection of identified den sites

1 during the breeding season. The Board is left with the firm and definite conviction that a  
2 mistake has been made in failing to designate Gray Wolf habitat.

3  
4 Common Loon. Common Loons breed on large lakes in forested areas, and nests are  
5 situated on shorelines, islands, or floating structures within 1.5 meters (5 feet) of shore;  
6 Common Loons are very susceptible to nest disturbance and are intolerant of recurrent  
7 disturbance within 150 meters (492 feet) of nest sites.<sup>33</sup> Petitioners argue Ferry County has  
8 designated lakes over 19 acres in area as a FWHCA but has not designated shoreline  
9 nesting and breeding sites.<sup>34</sup> Respondent asserts it has protected shorelines with buffers  
10 between 50 and 150 feet from the water's edge.<sup>35</sup> However, the Board notes the County's  
11 ordinance did not designate landward shoreline buffers as part of the FWHCA; it only  
12 designates the lake itself.<sup>36</sup> The Board is left with the firm and definite conviction that a  
13 mistake has been made in failing to designate shoreline nesting and breeding sites for the  
14 Common Loon, as recommended by the Best Available Science.  
15  
16

17 With respect to the ETS species Bald Eagle, Peregrine Falcon, Gray Wolf, and Common  
18 Loon, Ferry County has departed from or ignored the scientific recommendation by WDFW  
19 to designate E/T/S habitats, without any reasoned justification. Contrary to WAC 365-190-  
20 080(4), the County did not use any maps and did not use performance standards to  
21 designate Fish and Wildlife Habitat Conservation Areas for these four ETS species.  
22  
23

#### 24 **Ordinance 2012-05, Section 9.03 Protection Requirements**

25 As to the Common Loon, Section 9.03(10) states: "Regulations to protect the Common Loon  
26 FWHCA includes all regulations applicable to the use of the waterbody, shoreline  
27  
28

29 <sup>33</sup>*Management Recommendations for Washington's Priority Species, Volume IV: Birds*; Larson, Azerrad, and  
30 Nordstrom, Technical Editors, Washington Department of Fish and Wildlife, page 1-4 (May 2004) --  
31 Futurewise's Motion to Supplement the Record, Tab 601 (Oct. 19, 2012).

32 <sup>34</sup>Concerned Friends of Ferry County's, David L. Robinson's, and Futurewise's Concurrence in and Objections  
to a Finding of Compliance and Petition for Imposition of Invalidity, page 15 (October 19, 2012).

<sup>35</sup>Ferry County's 2012 Response to Petitioners Objections, page 6 (October 29, 2012).

<sup>36</sup>Ferry County Critical Areas Ordinance No. 2012-05, Section 9.02 Designation, page 43 (September 24,  
2012).

1 regulations, and buffers as provided in this section.”<sup>37</sup> WDFW’s scientific management  
2 recommendations include:

- 3 • Protect known nest and nursery sites.
- 4 • Restrict disturbance of nest sites from 1 April to 15 July and brood-rearing nursery
- 5 pools from 15 July to 1 September. Maintain a 150 m (492 ft.) disturbance buffer
- 6 around brood-rearing areas (nursery pools) from 15 July to 1 September.
- 7 • Erect no structures within 150 m (492 ft.) of nesting sites. Avoid building within this
- 8 distance year round to maintain a permanent buffer around nests.<sup>38</sup>
- 9

10  
11 Section 9.03 does not consider or mention these Common Loon management  
12 recommendations that are part of the BAS record. Thus, Ferry County has departed from or  
13 ignored the scientific recommendation by WDFW to protect Common Loon habitats, without  
14 any reasoned justification. The Board is left with the firm and definite conviction that a  
15 mistake has been made in failing to consider these scientific recommendations to protect  
16 Common Loon habitat.  
17

18 Ferry County is in continuing non-compliance as to designating and protecting Fish and  
19 Wildlife Habitat Conservation Areas for ETS species. However, the Board does not address  
20 the “designation of habitats and species of local importance” at this time since that is  
21 currently being litigated in the courts and is being held in abeyance pending court  
22 instructions.  
23  
24

## 25 **Ordinance 2012-05, Section 9.04 Mapped Habitat Areas and Mapped Species**

### 26 **Observations Review**

27 The Growth Management Act requires counties to include the Best Available Science in  
28 developing policies and development regulations to protect the functions and values of Fish  
29  
30

31 <sup>37</sup> Ferry County Critical Areas Ordinance No. 2012-05, Section 9.02 Designation, page 48 (September 24,  
32 2012).

<sup>38</sup> *Management Recommendations for Washington’s Priority Species, Volume IV: Birds*; Larson, Azerrad, and  
Nordstrom, Technical Editors, Washington Department of Fish and Wildlife, page 1-4 (May 2004) --  
Futurewise’s Motion to Supplement the Record, Tab 601 (Oct. 19, 2012).



1 and Wildlife Habitat Conservation Areas. In the December 1, 2011 Compliance Order, the  
2 Board found non-compliance with the GMA's requirements relating to Habitat Polygons. As  
3 to the protection of Habitat Polygons, the Board in 2011 found and concluded as follows:

- 4 • Petitioners failed to carry their burden of proof to demonstrate that standardized, one-  
5 size-fits-all buffers are required for all types of habitat polygons; however Petitioners  
6 did carry their burden of proof, in part, by demonstrating that Ferry County departed  
7 from BAS without a reasoned justification by failing to consider species-specific  
8 buffers for Bald Eagle and Lynx polygons.  
9
- 10 • Ordinance 2011-02, Section 9.04 does not adequately protect Fish and Wildlife  
11 Habitat Conservation Areas as required by RCW 36.70A.060(2).  
12
- 13 • There is substantial scientific evidence in the record to support a project review  
14 process "triggered" by proposals within a specified distance of both habitat points and  
15 habitat polygons. On remand, Ferry County should provide a reasoned justification if  
16 it wishes to depart from BAS.  
17
- 18 • There is substantial scientific evidence in the record to support the need for a  
19 required Habitat Management and Mitigation Plan for proposed development, which  
20 is triggered by being within a specified distance of a FWHC Area. On remand, Ferry  
21 County should provide a reasoned justification if it wishes to depart from BAS.  
22
- 23 • Ferry County failed to include the Best Available Science in developing policies and  
24 development regulations to protect the functions and values of habitat polygons.  
25
- 26 • Ordinance 2011-02, Section 9.04 as it relates to protecting habitat polygon areas  
27 using species-specific buffers was clearly erroneous in view of the entire record  
28 before the Board and in light of the goals and requirements of the Growth  
29 Management Act.  
30  
31  
32

1 In 2011, the Board noted the record contains a March 25, 2010 letter from WDFW's Priority  
2 Habitats and Species Biologist to Ferry County, stating:

3 WDFW recommends that our Priority Habitats and Species (PHS) list and  
4 PHS mapped data be consulted and used to assist in designating Fish and  
5 Wildlife Habitat Conservation Areas under the Critical Areas Ordinance. The  
6 PHS data includes mapped habitat areas and species point and polygon data.  
7 This data is based on known observations in the field and science-based  
8 survey and mapping projects, but is incomplete as all areas have not been  
9 surveyed. WDFW does not have PHS requirements, but we offer the use of  
10 the information as a science-based technical assistance tool, that meets the  
11 best available science requirements under the Growth Management Act. . . .

12 Priority habitats are those with unique or significant value to species, based on  
13 high density or diversity of fish and wildlife species, important breeding or  
14 seasonal ranges, or important movement corridors. . . .

15 Priority species are those that WDFW has listed as State endangered,  
16 threatened, or sensitive and those that are candidates for listing. . . .

17 Habitat areas associated with a priority species may be mapped as a point,  
18 line, or polygon in the PHS GIS database. . . . WDFW does not require buffers  
19 on mapped PHS points, lines, or polygons. WDFW may recommend particular  
20 buffer distances for different types of disturbances or land uses, based on best  
21 available science. . . .

22 As for regulatory buffers, (established distances from a certain point or  
23 polygon that would require some kind of avoidance or mitigation action),  
24 WDFW does not have a single, standard recommended buffer. WDFW does  
25 have regulatory buffers for Bald Eagle territories and there are also regulatory  
26 buffers for some species triggered by forest practices under the Department of  
27 Natural Resources Forest Practice Rules.

28 Consistent with the Washington State Department of Commerce guidance,  
29 WDFW does recommend that applicants look beyond their parcel boundaries  
30 for potential impacts to critical areas that are not on their site. The  
31 establishment of an area of project review adjacent to FWHCA is different than  
32 establishing a regulatory buffer. Reviewing projects within an area adjacent to  
a mapped habitat area allows for the County to consider whether the project  
should be mitigated in some way to avoid adverse impacts. Commerce  
recommends that the Critical Areas Ordinance require applicants to consider  
impacts to critical areas on adjacent parcels, based on the maximum  
protection buffer that could be required in a jurisdiction, or a standard distance,

1 or a combination. The guidance offers different approaches for this,  
2 acknowledging that one standard distance may not be accurate.<sup>39</sup>

3 The science in the record indicates that establishing an area of project review adjacent to  
4 polygons is different from establishing an area of regulatory buffer adjacent to polygons.  
5 The regulatory buffer would require some kind of avoidance or mitigation action within the  
6 defined buffer area, whereas the project review process would consider options for potential  
7 mitigation of impacts from the off-site project.<sup>40</sup>  
8

9 WDFW recommends different buffer sizes for different species under different  
10 circumstances. For example, the scientific record contains some species-specific buffer  
11 recommendations for the Bald Eagle.<sup>41</sup> In addition, a Stevens County court decision held  
12 that (1) Best Available Science establishes that Lynx polygon buffers are necessary, and (2)  
13 the failure of Stevens County to use BAS to adopt scientifically defensible buffers adjacent  
14 to Lynx polygons violated the GMA.<sup>42</sup> Thus, the BAS record here does not support one-size-  
15 fits-all polygon buffers, but the record does support species-specific polygon buffers.  
16  
17

18 With regard to protection of Lynx, a federally-designated Threatened Species, the record  
19 contains scientific information and recommendations on protecting the habitat functions and  
20 values. The Washington State Recovery Plan for the Lynx states in part as follows:  
21

22 *Forest roads and recreation.* The introduction of a road system in previously  
23 undisturbed landscapes has direct and indirect effects on lynx. Although road  
24 edges may provide foraging opportunities, roads eliminate some lynx habitat  
25 (6 ac per mile) while increasing recreational access to remote areas. Lynx  
26 may become more vulnerable to disturbance and illegal and incidental  
27 hunting and trapping mortalities. The impact of recreational activities on lynx

28 <sup>39</sup> Letter to Ferry County from PHS/GMA Biologist Karin Divens of the Washington State Department of Fish  
29 and Wildlife, pages 1-3 (March 25, 2010) – Motion to Supplement the Record, Tab 502A (Sept. 7, 2011).

30 <sup>40</sup> Letter to Ferry County from PHS/GMA Biologist Karin Divens of the Washington State Department of Fish  
31 and Wildlife, page 2 (March 25, 2010) – Motion to Supplement the Record, Tab 502A (Sept. 7, 2011).

32 <sup>41</sup> Letter to Ferry County from PHS/GMA Biologist Karin Divens of the Washington State Department of Fish  
and Wildlife, page 2 (March 25, 2010) – Motion to Supplement the Record, Tab 502A (Sept. 7, 2011).

<sup>42</sup> Memorandum Decision on Appeal from Growth Management Hearings Board, Stevens County Superior  
Court Judge Rebecca (April 5, 2011) -- Motion to Supplement the Record, Tab 502A (Sept. 7, 2011). See also,  
IR 502 - Washington State Recovery Plan for the Lynx, Washington State Department of Fish and Wildlife  
(Stinson, D.W. 2001).

1 has received little study. The amount of recreational development and activity  
2 in higher elevations has been increasing rapidly in recent years. It is  
3 speculated that compacted snow on roads and trails increases the use of  
4 high elevations by coyotes and bobcats (see Competition..., p. 31). Even if  
5 facilitating competition is not a factor, high intensities of winter recreation are  
6 likely to affect lynx habitat use. Impacts may depend on the quality of lynx  
7 habitat, season, time of day, and the type, frequency, and pattern of activity  
8 (Ruediger, et al. 2000).<sup>43</sup>

9 In addition, there is science in the record stating that “[a]ny substantial increase in human  
10 activities in remote areas is likely to have adverse effects on rare forest carnivores”  
11 including the Lynx,<sup>44</sup> and scientific recommendations to protect Lynx denning sites from the  
12 adverse effects of winter recreation activities and human disturbance.<sup>45</sup> WDFW  
13 recommended that Ferry County adopt a 200 foot wide trigger distance around the Lynx  
14 habitats polygons.<sup>46</sup>

15 Science in the record indicates that:

16  
17 Sites identified as priority habitats or locations where a priority species is  
18 known to occur often are represented on a map as a point or a polygon.  
19 Although the exact mapped locations are undoubtedly important, the area  
20 surrounding these locations may also need to be evaluated to determine  
21 what land uses are compatible or incompatible with the requirements of  
22 species using an area.<sup>47</sup>

23 <sup>43</sup> Futurewise’s Motion to Supplement the Record, Tab 602 (Oct. 19, 2012), Stinson, D. W., *Washington State*  
24 *Recovery Plan for the Lynx*, page 30 (Washington Department of Fish and Wildlife, Olympia, Washington:  
25 2001).

26 <sup>44</sup> Futurewise’s Motion to Supplement the Record, Tab 619 (Oct. 19, 2012), Bull et al., *Effects of Disturbance*  
27 *on Forest Carnivores of Conservation Concern in Eastern Oregon and Washington* 75 NORTHWEST SCIENCE  
28 180, 182 (Special issue 2001).

29 <sup>45</sup> Futurewise’s Motion to Supplement the Record, Tab 620 (Oct. 19, 2012), Michael J. Wisdom, Richard S.  
30 Holthausen, Barbara C. Wales, Christina D. Hargis, Victoria A. Saab, Danny C. Lee, Wendel J. Hann, Terrell  
31 D. Rich, Mary M. Rowland, Wally J. Murphy, and Michelle R. Eames; *Source Habitats for Terrestrial*  
32 *Vertebrates of Focus in the Interior Columbia Basin: Broad-Scale Trends and Management Implications:*  
33 *Volume 2—Group Level Results*; p. 246 in Thomas M. Quigley, Editor, *Interior Columbia Basin Ecosystem*  
34 *Management Project: Scientific Assessment* (U.S. Department of Agriculture, Forest Service, Pacific  
35 Northwest Research Station, Portland, Oregon: General Technical Report PNW-GTR-485 May 2000).

36 <sup>46</sup> Futurewise’s Motion to Supplement the Record, Tab 616 (Oct. 19, 2012); Ferry County’s Post-Hearing  
37 Supplemental Brief Appendix 19 (Oct. 25, 2011); April 14, 2010 Discussion with Karin Divens at the Planning  
38 Commission Regular Meeting, p. 16.

39 <sup>47</sup> Futurewise’s Motion to Supplement the Record, Tab 615 (Oct. 19, 2012), Washington Department of Fish  
40 and Wildlife, *Priority Habitat and Species List*, p. 3 (Olympia, Washington: 2008).

1 In the 12/1/2011 Compliance Order, the Board noted as to project review processes for  
2 proposals adjacent to mapped habitat points, lines, or polygons, the BAS in the record  
3 recommends that nearby project proponents be required to evaluate impacts and potential  
4 mitigation for proposals located within a specified distance of mapped habitat. CAO Section  
5 9.04(2) provides for such a review process for proposed projects located within 1,000 feet of  
6 a documented point location for an ETS species, but the County's process does not apply to  
7 proposed projects within some specified distance from a polygon. This approach is not  
8 consistent with the BAS, which clearly recommends project review both for areas adjacent  
9 to habitat polygons and for areas adjacent to habitat points. As such, CAO Section 9.04(2)  
10 represents a departure from BAS without any reasoned justification, since the review  
11 process does not apply to mapped polygons or lines.  
12  
13  
14

15 Also, Critical Areas Ordinance Section 9.04, was amended by Ordinance 2011-02 to no  
16 longer require the preparation of a Habitat Management and Mitigation Plan for a proposed  
17 development – instead such a Plan “may” be required. The prior version of the CAO,  
18 Ordinance No. 2009-05, provided that “Ferry County will require a Habitat Management and  
19 Mitigation Plan for the proposed development, based on the report of the qualified  
20 professional and best available science appropriate for the site (See Appendix B for  
21 details).”<sup>48</sup> In the 2011 Compliance Order, the Board determined this change from a  
22 required Plan to a discretionary Plan was a departure from BAS without any reasoned  
23 justification. WDFW's Biologist had clearly recommended that this Habitat Management and  
24 Mitigation Plan should be changed back to a required Plan in order to uniformly assess  
25 impacts and determine sufficient mitigation for off-site projects.  
26  
27

28 Petitioners assert that Ordinance 2012-05 made no changes to CAO Section 9.04 to  
29 address the 2011 non-compliance findings as to the designation and protection of Habitat  
30 Polygons. At the Compliance Hearing, Ferry County acknowledged that this non-compliance  
31 finding has not yet been addressed: “[T]here is work yet to be done to bring the County into  
32

---

<sup>48</sup> IR 506 in Tab 506, excerpts from Ferry County Critical Areas Ordinance 2009-05 p. 45.

1 full compliance with the 12/1/11 Compliance Order with regard to species-specific buffers  
2 and triggering of Habitat Management and Mitigation Plan for development proposed within  
3 certain distances of non-buffered habitat.”<sup>49</sup>  
4

5 The Board agrees that Ferry County is in continuing non-compliance as to Habitat Polygons.  
6 However, the Board does not address the “designation of habitats and species of local  
7 importance” at this time since that is currently being litigated in the courts and is being held  
8 in abeyance pending court instructions.  
9

### 10 **Conclusion**

11 As to Fish and Wildlife Habitat Conservation Areas for Endangered, Threatened, and  
12 Sensitive Species, the Board finds and concludes as follows:  
13

- 14 • There is no substantial evidence in the record to support a County finding that Best  
15 Available Science was included in designating and protecting Ferry County’s Fish  
16 and Wildlife Habitat Conservation Areas for Endangered, Threatened, and Sensitive  
17 Species.
- 18 • Ferry County failed to include the Best Available Science in designating areas where  
19 Endangered, Threatened, and Sensitive Species have a Primary Association.
- 20 • Critical Areas Ordinance 2012-05 (relating to ETS Habitats and Species) is clearly  
21 erroneous in view of the entire record before the Board and in light of the goals and  
22 requirements of the Growth Management Act.
- 23 • On remand, Ferry County should provide a reasoned justification for departing from  
24 Best Available Science in designating and protecting Fish and Wildlife Habitat  
25 Conservation Areas.  
26

27 As to Habitat Polygons, the Board finds and concludes as follows:

- 28 • Ferry County is in continuing non-compliance with the requirements of the Growth  
29 Management Act to include Best Available Science in designating and protecting  
30 Habitat Polygons.  
31  
32

---

<sup>49</sup> Ferry County’s 2012 Response to Petitioners Objections, p. 10 (October 29, 2012).

- Critical Areas Ordinance 2012-05 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

## **B. CRITICAL AREAS LOW INTENSITY LAND USE DEFINITION**

The Growth Management Act requires all counties and cities to adopt development regulations that protect Critical Areas.<sup>50</sup> The GMA defines the term “Critical Areas” as including “Wetlands.”<sup>51</sup>

In the December 1, 2011 Compliance Order, the Board found Ferry County’s Critical Areas Ordinance non-compliant with the GMA because it allowed for agricultural uses in a Low Intensity wetland, contrary to Best Available Science.

In adopting Ferry County Ordinance 2012-05, Section 3.00, the County removed “agriculture” from the definition of Low Intensity Land Use. Petitioners state that this amendment warrants a finding of compliance. The Board agrees and finds the Critical Areas Low Intensity Land Use definition, as amended by Ordinance 2012-05, to be compliant with the Growth Management Act.

## **C. INVALIDITY**

For Ferry County’s failure to protect federal and state ETS species and habitats, Petitioners request that the Board impose invalidity for Ferry County’s Future Land Use Map and apply the finding to all lands within 200 feet of those habitats. For Ferry County’s failure to protect polygon and line habitats, Petitioners request that the Board impose invalidity for Ferry County’s Future Land Use Map and apply the finding to all lands within 200 feet of the polygon and line habitats.

Under RCW 36.70A.302(1), the Board may determine that part or all of a comprehensive plan or development regulations are invalid if the Board:

---

<sup>50</sup> RCW 36.70A.060(2).

<sup>51</sup> RCW 36.70A.030(5).

- 1 (a) Makes a finding of noncompliance and issues an order of remand under  
2 RCW 36.70A.300;  
3 (b) Includes in the final order a determination, supported by findings of fact  
4 and conclusions of law, that the continued validity of part or parts of the plan or  
5 regulation would substantially interfere with the fulfillment of the goals of this  
6 chapter; and  
7 (c) Specifies in the final order the particular part or parts of the plan or  
8 regulation that are determined to be invalid, and the reasons for their invalidity.

9 The Board finds that Petitioners have failed to identify particular parts of the plan or  
10 regulations that should be found invalid and that substantially interfere with fulfillment of the  
11 goals of the GMA. As to the Future Land Use Map in particular, Petitioners have failed to  
12 show how invalidity would protect any fish and wildlife habitat or promote fulfillment of  
13 specific GMA goals. Accordingly, the Board declines to issue a determination of invalidity at  
14 this time.

## 15 **V. CONSOLIDATION**

16 The Board has determined that Case Nos. 97-1-0018 and 06-1-0003 involve review of the  
17 same Critical Areas Ordinance provisions and policies on Fish and Wildlife Habitat  
18 Conservation Areas. Accordingly, pursuant to RCW 36.70A.290(5), Case Nos. 97-1-0018  
19 and 06-1-0003 shall henceforth be consolidated under Case No. 97-1-0018c.

## 20 **VI. ORDER**

21 Ferry County is in continuing non-compliance with the Growth Management Act requirement  
22 to include the Best Available Science in designating and protecting Fish and Wildlife Habitat  
23 Conservation Areas for Endangered, Threatened, and Sensitive Species under RCW  
24 36.70A.170, RCW 36.70A.060(2), and RCW 36.70A.172, and  
25

26 Ferry County is ordered to bring its Comprehensive Plan and Development Regulations into  
27 compliance with the Growth Management Act according to the following schedule:  
28  
29  
30  
31  
32



Item	Date Due
Compliance Due	May 23, 2013
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	June 6, 2013
Objections to a Finding of Compliance	June 20, 2013
Response to Objections	July 1, 2013
<b>Compliance Hearing – Telephonic Call 1-800-704-9804 and use pin 5721566#</b>	<b>July 11, 2013 10:00 a.m.</b>

Entered this 23rd day of January, 2013.

\_\_\_\_\_  
Raymond L. Paoella, Board Member

\_\_\_\_\_  
Chuck Mosher, Board Member

\_\_\_\_\_  
Margaret Pageler, Board Member

**Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.<sup>52</sup>**

<sup>52</sup> Should a party choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.